IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HAY GROUP, INC., Plaintiff v. E.B.S. ACQUISITION **INC.**, Defendant	:	NO. 02-MC-252
HAY GROUP, INC., Plaintiff v. PRICEWATERHOUSECOOPERS L.L.P., Defendant	:	NO. 02-MC-253

MEMORANDUM AND ORDER

McLaughlin, J. November 27, 2002

The Hay Group, Incorporated, ("Hay") has filed a motion to enforce non-party arbitration subpoenas for documents against PricewaterhouseCoopers ("PwC") and **E**.B.S. Acquisition ("E.B.S."). The arbitration is due to begin on December **18**, 2002 in Philadelphia. The arbitration proceeding is between Hay and one of its former employees, David A. Hofrichter. Hay alleges that following Mr. Hofrichter's separation from Hay, Mr. Hofrichter breached the non-solicitation clause in his separation agreement by improperly soliciting Hay employees to join his subsequent employer, PwC, and by improperly soliciting Hay clients to use the services of PwC instead of Hay.

Hay is a management consulting firm that provides human

resources and compensation consulting services. Mr. Hofrichter left Hay in September 1999 and joined PwC in its Chicago, Illinois office. Subsequently, PwC sold its human resources consulting practice - the practice in which Mr. Hofrichter worked – to E.B.S., an entity related to Buck Consultants, Incorporated.

The subpoenas seek documents relating to any communications PwC or Mr. Hofrichter had with Hay employees following Mr. Hofrichter's separation from Hay, any communications PwC had with recruitment firms regarding the recruitment of professionals **for** Mr. Hofrichter's department, any communications between Mr. Hofrichter and any Hay client following his separation from Hay, and client billing information relating to Mr. Hofrichter and two former Hay employees who left Hay to join PwC during the term of Mr. Hofrichter's non-solicitation agreement.

PwC and E.B.S. raise a variety of objections to the subpoenas. Several of the objections involve the language of Section 7 of the Federal Arbitration Act (FAA), so the Court quotes it:

> The arbitrators... may summon in writing any **person** to attend before them or **any** of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. ... Said summons shall issue in the name of the arbitrator or arbitrators, or a majority **of** them,

> and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse **or** neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or **a** majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

9 **U.S.C.** § 7 (2002). The Court will consider each objection in turn.

1. Does the Federal Arbitration Act Empower Arbitrators to Issue a Subpoena for Documents to be Produced Before the Hearing?

PwC **and** E.B.S. first argue that the FAA does not empower the arbitrators to issue a subpoena to non-parties for the production of documents prior to the hearing date, but only at the hearing itself. The respondents point to language in the FAA stating that arbitrators "may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him" documents (emphasis supplied).

The Court concludes that implicit in the power to compel the production of documents at the hearing is the power to compel the production of documents prior to the hearing so that the parties may prepare for the hearing. This does not present

an extra burden to the person producing the documents. Documents are produced only once - whether at the arbitration or prior to it. It makes sense to order the documents produced ahead of time so that the parties can familiarize themselves with the documents before the hearing starts. Otherwise, the panel would have to convene the hearing, receive the documents, and then recess the hearing so that the parties can review the documents.

Several district courts and the Eighth Circuit have reached the same conclusion. Securitv Life Ins. Co. et al. **v.** Duncanson & Holt et al., 228 F.3d 865, 870-71 (8th Cir. 2000) ("We thus hold that implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing."); Douqlas Brazell **v.** American Color Graphics, 2000 **U.S.** Dist. LEXIS 4482 at *8-9 (S.D.N.Y. Apr. 7, 2000) (holding that the Court could compel compliance with an arbitration subpoena calling for pre-hearing document production from a non-party); Integrity Ins. Co. v. American Centennial Ins. Co., 885 F. Supp. 69, 73 (S.D.N.Y. 1995) (holding that the FAA authorized those provisions of arbitration subpoenas calling for pre-hearing document production by non-parties); Meadows Indem. Co. Ltd. v. Nutmeg Ins. Co., 157 F.R.D. 42, 45 (M.D. Tenn. **1993)** ("The power **of** the panel to compel production of documents from

third-parties for the purposes of a hearing implicitly authorizes the lesser power to compel such documents for arbitration purposes prior to a hearing.").

I want to stress that the subpoenas at issue here are not for deposition testimony. The Court might come out differently in such a case, as did the Court in Integrity Insurance Company, 885 F. Supp. at 73. Although the Integrity court refused to enforce a subpoena for a non-party deposition, it recognized that arbitrators could order the production of documents without testimony prior to the hearing. Id.

The defendants rely on Comsat Corporation v. National Science Foundation et al. 190 F.3d 269, 275-76 (4th Cir. 1999). That case involved a non-party subpoena for deposition testimony and documents. The Comsat court held that Section 7 did not authorize arbitrators to order non-parties either to appear at depositions or to provide litigating parties with documents during pre-hearing discovery. Id. at 275.

The Comsat court, however, did allow arbitration subpoenas for documents from non-parties when a party has a "special need" for the documents. Id. at 276. It created this exception to allow parties in complex arbitration cases to review relevant evidence prior to the hearing so the hearing could be conducted efficiently. Id.

The result reached by this Court is similar to the result reached by the Fourth Circuit in Comsat. The difference is that the Fourth Circuit would require a party to an arbitration to show a "special need" for the documents pre-hearing. If Section 7 of the FAA is flexible enough to allow for pre-hearing production in a "special need" situation, it is flexible enough to allow for pre-hearing production of documents when the arbitrators believe that it is appropriate without the federal court holding a hearing to determine "special need" in every case.

2. Are the Subpoenas Properly Signed by the Panel?

The subpoenas were signed by one of the three arbitrators, Abraham J. Gafni, "For the Arbitration Panel." When the respondents objected to the subpoenas because they were not signed by each of the panel members, Mr. Gafni wrote a letter stating that he had discussed the subpoenas with the other two panel members and they "reached a unanimous agreement on how to handle these subpoenas." Mr. Gafni signed for the panel because one of the other arbitrators is often out of his office.

9 U.S.C. § 7 states: "[s]aid summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority *of* them." The

Court concludes that the procedure for signing used by the panel conformed to the statute. Mr. Gafni had the authority to sign for the other panel members and noted that he signed the subpoenas pursuant to this authority. Also, not only a majority of the arbitrators authorized the subpoenas but all of them did so.

3. Can This Court Compel the Production by a Non-Party of Documents Located in Other Judicial Districts?

The documents requested by the two subpoenas are not located in this district. The documents requested of E.B.S. are primarily in Chicago, Illinois; the documents requested of PwC are in Chicago; Tampa, Florida; and Poughquag, New York. Defendants argue that this Court, therefore, cannot compel their production.

The Court concludes that this Court may do so if the subpoenas are properly served pursuant to Federal Rule of Civil Procedure 45. The Court begins its analysis again with 9 U.S.C. § 7, which provides that a summons by the arbitrators "shall be served in the same manner as subpoenas to appear and testify before the court." Because Rule 45 governs the service of subpoenas to appear and testify before the federal courts, the Court concludes that Rule 45 also governs the service of an arbitration subpoena. See Lesion Ins. Co. v. John Hancock Mutual

Life Ins. Co., 2001 U.S. Dist. **LEXIS 15911** at *3 (E.D.Pa. Sept. 5., 2001), aff'd, 33 Fed. Appx. 26 (3d Cir. 2002) (using Fed. R. Civ. P. 45 to determine appropriate service of an arbitration subpoena).

Under Rule 45(b)(2),

> a subpoena may be served at any place within the district of the court by which it is issued, or at any place without the district that is within 100 miles of the place of the... production... or at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the... production... specified in the subpoena.

Pennsylvania law allows any state court of record to serve subpoenas throughout the state. 42 Pa. C.S. § 5905 (2002).

The subpoena was served on E.B.S. in Pittsburgh. At the oral argument on the motion, counsel for **E.B.S.** stated that E.B.S. does not dispute that the service was proper under Rule 45(b)(2). Although PwC has an office in Philadelphia, it was served with the subpoena at its Chicago, Illinois office. The Court concludes and stated **at** the oral argument that PwC had not been properly served.[1] Since oral argument, the petitioner has

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[1] Hay relies on Ruby v. Delta International Machine Corporation for the proposition that its service of PwC was proper. 50 Pa. D & C 4th 80 (2000). In Rubv, however, the issue was not whether the third party had to be served in the state in which the court was located, but rather whether it had to produce documents outside the state. The **third** party from whom the

filed an affidavit of service of the subpoena on PwC at its Philadelphia office. This service appears to comply with Rule 45(b)(2).

The next question is whether this Court can enforce a properly served subpoena that requires the corporation to produce documents that are located outside the service range of Rule 45(b)(2). Respondents argue that the Court cannot.

The Court first considers whether it could enforce such a subpoena in the non-arbitration context. The answer is clearly yes. The Advisory Committee Notes to Rule 45(a)(2) state: "Paragraph (a)(2) makes clear that the person subject to the subpoena is required to produce materials in that person's control whether or not the materials are located within the district or within the territory within which the subpoena can be served."

Moore's Federal Practice sets forth the relationship between Rule 45(a) and (b):

> Rule 45(b) mandates where a subpoena may be served on a person, and limits the places where a witness can be called upon to appear or produce. Rule 45(a) indicates from which court the subpoena should issue. In the case of a subpoena to produce documents, the subpoena should issue from the Court where the production of documents is to

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subpoena required documents had an office in the state in which the court was located.

occur, regardless of where the documents are located.

9 Moore's Federal Practice, § 45.03 (Matthew Bender 3d ed. 2000).

The Court concludes from the language of the rule and the commentaries on it that PwC and E.B.S. would have to produce responsive documents located in other districts if this matter were federal court litigation pending in this district and the subpoenas had been served on PwC and E.B.S. in Pennsylvania. This makes sense. Otherwise, a party would have to serve multiple subpoenas on the various locations of a corporate party where the documents are located. To accomplish this, the party would first have to find out in which locations the documents are kept. Parties could put documents in far flung jurisdictions to make the task of subpoenaing them more difficult.

The next question is, should the answer be any different in the case of an arbitration subpoena? The Court does not see why it should. As long as § 7 and Rule 45 are complied with, the non-parties' rights are protected.

4. Should the Subpoenas be Enforced?

Respondents argue that the subpoenas ought not to be enforced because they are overbroad and seek confidential

information and trade secrets.' In response to these objections, the Hay Group has offered to limit its requests and to enter into a confidentiality order.

At the oral argument, the Court discussed with the parties whether they want the Court to resolve the overbreadth/ confidentiality issues if it decided **to** reject the defendants' other objections to the subpoenas. The parties said that they would like to try to work out the objections themselves. The Court agreed and will not resolve these issues now. The defendants also reserved their rights to appeal the Court's decision.

In order to balance the defendants' appeal rights and the plaintiff's need for the documents for the December 18, 2002

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[2] PwC also argued that the arbitrators have not made a finding that the documents are "material" **as** required by the FAA. The Court disagrees.

When Hay's initial subpoena for the documents at issue were served on PwC, PwC objected **to** it as including documents that contained confidential and proprietary information and that were not reasonably calculated to lead to the discovery of admissible evidence. The arbitration panel requested that Hay respond to PwC's objections before attempting to enforce its subpoena against PwC in federal court. Hay responded as requested.

In October 2002, the arbitration panel informed Hay that it would not limit the scope of Hay's subpoena against PwC and that Hay should seek judicial relief if PwC did not comply with Hay's subpoenas.

arbitration hearing, the Court orders the parties to start to negotiate the remaining objections to the subpoenas on or before December 6, 2002. This will give the defendants time to file a notice of appeal and seek a stay of the Court's order prior to December 6. If the parties are not able to negotiate their differences successfully, they may return to the Court for resolution of any remaining issues.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HAY GROUP, INC.,
Plaintiff

v. NO. 02-MC-252

E.B.S. ACQUISITION INC.,
Defendant

HAY GROUP, INC.,
Plaintiff

v. NO. 02-MC-253

PRICEWATERHOUSECOOPERS L.L.P.,
Defendant

ORDER

AND NOW, this 27th day of November, 2002, upon consideration of the Plaintiff's Motion to Enforce Its Non-Party Subpoena for Production of Documents against E.B.S Acquisition Corporation (Docket #1, 02-MC-252), the Defendant's Response in opposition to this motion, and the Plaintiff's Reply, as well as the Plaintiff's Motion to Enforce Its Non-Party Subpoena for production of Documents on PricewaterhouseCoopers, L.L.P. (Docket #1, 02-MC-253), the Defendant's Response in Opposition to this motion, and the Plaintiff's Reply, and after oral argument on both motions, it is hereby Ordered that both motions are Granted for the reasons set forth in a memorandum of today's date.

It is furthered Ordered that the parties start to negotiate any remaining objections to the subpoenas on or before December 6, 2002. If the parties are not able to negotiate their differences successfully, they may return to the Court for resolution of any remaining issues. The December 6, 2002, date is selected to give the defendants time to file any notice of appeal and seek any stay of the Court's order prior to December 6.

BY THE COURT:

MARY A. MCLAUGHLIN, J.

d from Chambers 11/27/02:
Peter Woodford
Kevin Todd
John Jones
Mary Hackett
Nicholas Sansevino
Sarah McClure